United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4076

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-4076

B

P/S.

REINHARD WILHELM LINDNER, :

Petitioner, :

V.

IMMIGRATION AND NATURALIZATION SERVICE: :

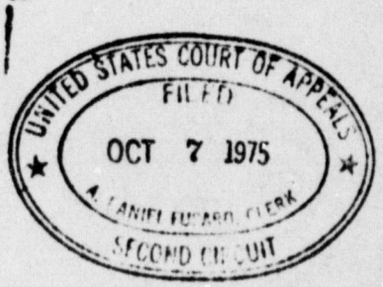
Respondent. :

PETITION FOR REVIEW

BOARD OF IMMIGRATION APPEALS

BRIEF OF APPELLANT

Law Offices-J. Ward Rafferty
Appellant Counsel
231, Captain's Walk
New London, Connecticut, 06320



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STATEMENT OF CASE

The Appellant, Reinhard Wilhelm Lindner, is a twenty-seven-year-old native of West Germany who was admitted to the United States for permanent residence on February 20, 1957 at age eight. He is married to a United States citizen and is an Elder in the Mormon Church and is active in Church and civic affairs. Prior to this transformation in his life, the appellant was convicted on a charge of possession of marijuana on April 29, 1971 in the Connecticut Superior Court for New London County. He was found to be deportable on November 15, 1971 pursuant to Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)). Subsequently he was granted a pardon pursuant to Section 54-90 of the Connecticut General Statutes by the Connecticut Pardon Board (which meets pursuant to Section 18-24a et seq. of the Connecticut General Statutes). On May 15, 1973, his post-conviction motion, i.e., Petition For Erasure of Record, was granted by the Connecticut Superior Court for New London County under Section 54-90 of the Connecticut General Statutes. The legal effect of the granting of said Motion was to erase appellant's arrest and conviction ab initio.

On May 17, 1973 the appellant's case was argued before the Board of Immigration Appeals in Washington, D.C.

The aforesaid Board of Immigration Appeals rendered its decision on January 31, 1975 dismissing the appellant's appeal. Matter of Lindner, Interim Decision 2341 (BIA 1975).

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

I

Whether a resident alien who entered the United States in 1957 and who was convicted of possession of marijuana in the Connecticut Superior Court for New London County may be deported for said conviction pursuant to Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)) when the Superior Court for New London County has granted his post conviction motion, i.e., Petition For Erasure of Record, when the legal effect of said Motion, pursuant to Section 54-90 of the Connecticut General Statutes, is to expunge the conviction and the arrest ab initio.

II

Whether the failure of the Immigration and Naturalization Service to accept the expungement of the appellant's record by the Connecticut Superior Court for New London County when the Immigration and Naturalization Service accepts Federal and State expungement of records under "youth correction" acts of individuals found deportable under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11) is a denial of Due Process under the Fifth Amendment of the United States Constitution.

THE ARGUMENT

I

Whether a resident alien who entered the United States in 1957 and who was convicted of possession of marijuana in the Connecticut Superior Court for New London County may be deported for said conviction pursuant to Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)) when the Superior Court for New London County has granted his post-conviction motion, i.e., Petition For Erasure of Record, when the legal effect of said Motion, pursuant to Section 54-90 of the Connecticut General Statutes, is to expunge the conviction and the arrest ab initio.

There is no question that the Immigration and Naturalization Service may deport an individual for a conviction involving possession of marijuana that power exists only as long as the conviction itself remains in force and effect. The Court of record for the conviction has granted a post-conviction Petition For Erasure of Record, the legal effect of which, under Section 54-90 of the Connecticut General Statutes, is to erase the conviction and arrest ab initio. Reduced to its essence, the Immigration and Naturalization Service is saying we are deporting you for a Connecticut conviction that Connecticut says you were never arrested or convicted for and which you may deny under oath without fear of perjury.

As Mr. Robert H. Bork, the Solicitor General, stated in Matter of Andrade, Interim Decision 2276 (BIA-1974):

"Deportation statutes, because of their drastic consequences, must be strictly construed. E.g., Barber v. Gonzales, 347 U.S. 637, 642-643; Fong How Tan v. Phelan, 333 U.S.6, 10...

"Where a federal or state Court conviction for a crime involving moral turpitude is expunged or set aside pursuant to a federal or state statute providing such a remedy (e.g., upon completion of probation or after custody as a youth offender), the conviction is no longer a basis for deportation under Section 1251(a)(4). See, e.g., Garcia-Gonzales v. Immigration and Naturalization Service, 344 F. 2d 804, 810 (C.A. 9), certiorari denied, 382 U.S. 840; Matter of G-, 1 I. & N. Dec. 96; Matter of O- T-, 4 I. & N. Dec. 265; Matter of G-, 9 I. & N. Dec. 159, 165; Matter of Gutnick, 13 I. & N. Dec. 672...

"It has sometimes been suggested, as a reason for disregarding expungement under state law when basing deportation under Section 1251(a)(11) on a state conviction, that deportation is a federal matter which should not be subjected to the varied consequences that states may choose to attach to convictions for offenses that justify deportation. See, e.g., Gonzalez de Lara v. United States, supra, 439 F. 2d at 1318-1319; de la Cruz Martinez v. Immigration and Naturalization Service, supra, 404 F. 2d at 1200; cf. Gutierrez-Rubio v. Immigration and Naturalization Service,

453 F. 2d 1243 (C.A. 5)(deportation under 8 U.S.C. 1251(a)(14)). This approach assumes, in effect, that all issues concerning deportation must be governed solely by federal law.

"It is true, of course, that in the first instance federal law normally governs the construction of federal statutes. In many cases, however, the federal rule of construction may call for reference to and reliance upon state law. See, e.g., Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 209-210; De Sylva v. Ballentine, 351 U.S. 570, 580-581; cf. United States v. Yazell, 382 U.S. 341, 354-348....."

"Indeed, in Matter of G-, supra, 9 I. & N. Dec. at 169, the Attorney General recognized that the Supreme Court's per curiam reversal of a deportation order under Section 1251(a)(4) in Pino v. Landon, 349 U.S. 901, indicated that the question whether a conviction should be treated as a basis for deportation is not 'purely a "federal question."'..." Matter of Andrade, Interim Decision 2276 (BIA-1974).

The United States Court of Appeals for the Sixth Circuit in the recent case of Aguilera-Enriquez v. Immigration and Naturalization Service, 17 CrL 2148 (May 7, 1975) held that the mere filing of a post-conviction motion is not sufficient to stay deportation under Section 241(a)(11) of the Immigration and Nationality Act. However, in reaching its decision, the Court found that:

"... If one is successful in reversing the judgment

and sentence, no conviction will remain to form a basis for deportation. But until a conviction is overturned, it is an adequate basis for a deportation order.

"... A conviction is final and is a valid basis for deportation unless and until overturned by a post-conviction plea." Aguilera-Enriquez v. Immigration and Naturalization Service, 17 CrL 2149.

II

Whether the failure of the Immigration and Naturalization Service to accept the expungement of the appellant's record by the Connecticut Superior Court for New London County when the Immigration and Naturalization Service accepts Federal and State expungement of records under "youth correction" acts of individuals found deportable under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11) is a denial of Due Process under the Fifth Amendment of the United States Constitution.

The Immigration and Naturalization Service has refused to accept the Connecticut expungement the same as those those expunged under"youth corrections" acts stating "We cannot impute to Congress an intention to allow for such metaphysical distinctions when they enacted Sections 241(a)(11) and 241(b)." Matter of Lindner, Interim Decision 2341 (BIA-1975). Our Nation was formed

two Hundred years ago by some of the most eminent metaphysicians of the Age of Enlightenment. These same men were among some of the members of the First Session of Congress. Some of the finest pages of this Country's proud history have been written by metaphysical Congressmen. I would respectfully submit that the converse of the Board of Immigration Appeals is true. Further, that it was metaphysical distinctions which were imputed to Congress in according expungement under Federal and State "youth corrections" acts their present force and effect.

The analysis of Mr. Robert H. Bork, the Solicitor General, in his March 7, 1974 letter which was part of the decision in Matter of Andrade, Interim Decision 2276 (BIA-1974), is highly relevant to the resolution of this issue by the Court. As Mr. Bork noted:

"Deportation statutes, because of their drastic consequences, must be strictly construed. E.g., Barber v. Gonzales, 347 U.S. 637, 642-643; Fong How Tan v. Phelan, 333 U. S. 6, 10. Accordingly, a state conviction of a youth offender for a marihuana offense which has been expunged following satisfactory rehabilitative treatment should not be regarded as the basis of deportation in the absence of persuasive reasons or a clear statement of congressional intent.

"Under 8 U.S.C. 1251(a), various categories of aliens are subject to deportation, upon order of the Attorney

General. One category includes, under specified circumstances, aliens 'convicted of a crime involving moral turpitude' (8 U.S.C. 1251(a)(4)), while another includes, inter alia, narcotic drug addicts and persons 'convicted of a violation of or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotics, drugs or marihuana * * *.' 8 U.S.C. 1251(a)(11).

"Where a federal or state court conviction for a crime involving moral turpitude is expunged or set aside pursuant to a federal or state statute providing such a remedy (e.g., upon completion of probation or after custody as a youth offender), the conviction is no longer a basis for deportation under Section 1251(a)(4). See, e.g., Garcia-Gonzales v. Immigration and Naturalization Service, 344 F 2d 804, 810 (C. A. 9), certiorari denied, 382 U.S. 840, Matter of G-, 1 I. & N. Dec. 96; Matter of O- T-, 4 I. & N. Dec. 265; Matter of G-, 9 I. & N. Dec. 159, 165; Matter of Gutnick, 13 I. & N. Dec. 672.

"...

"In Morera, (Mestre Morera v. Immigration and Naturalization Service, 462 F. 2d 1030 (C. A. 1)), however, the First Circuit held that a federal marihuana conviction set aside under the Federal Youth Corrections Act (8 U.S.C. 5021) following satisfactory completion of

rehabilitative treatment or probation was not a basis for deportation under Section 1251(a)(11). The court stated in Morera (462 F. 2d at 1032) that that Act

"'clearly contemplates more that a "technical erasure;" it expresses a Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions. * * * Pardon and leniency at most restore to an offender his civil rights; neither is as clearly directed as the Youth Corrections Act toward giving him a second chance, free of all taint of a conviction citation omitted. Indeed, the presence of section 241(b) [8 U.S.C. 1251(b)] suggests to us that if Congress had intended a section 5021 certificate to be inoperative with respect to Section 241(a)(11) [8 U.S.C. 1251(a)(11)], it would expressly have said so.'

"As I understand it, the Immigration and Naturalization Service not only follows Morera, but also, as a matter of policy, does not deport a person whose conviction is likely to be set aside pursuant to the Youth Corrections Act.

"Because the instant case does not involve a conviction set aside under Youth Corrections Act, the decision below does not present a square conflict with the holding in Morera. However, given the role neces-

sarily played by state law in deportation proceedings, the accommodation of competing policies in Morera is not rendered irrelevant here simply because Morera involved a conflict between two federal statutes, rather than a federal statute and a state statute, as here. Given Morera, there is little, if any, reason to justify a different result where the expungement of a youth offender's conviction occurred pursuant to state law. The same result can and, I think, should be reached in such a case.

"It has sometimes been suggested, as a reason for disregarding expungement under state law when basing deportation under Section 1251(a)(11) on a state conviction, that deportation is a federal matter which should not be subjected to the varied consequences that states may choose to attach to convictions for offenses that justify deportation. See, e.g., Gonzalez de Lara v. United States, supra, 439 F. 2d at 1318-1319; de la Cruz Martinez v. Immigration and Naturalization Service, supra, 404 F. 2d at 1200; cf. Gutierrez-Rubio v. Immigration and Naturalization Service, 453 F. 2d 1243 (C. A. 5) (deportation under 8 U.S.C. 1251(a)(14)). This approach assumes, in effect, that all issues concerning deportation must be governed solely by federal law.

"It is true, of course, that in the first instance federal law normally governs the construction of federal

statutes. In many cases, however, the federal rule of construction may call for reference to and reliance upon state law. See, e.g., Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 209-210; De Sylva v. Ballentine, 351 U. S. 570, 580-581; cf. United States v. Yazell, 382 U. S. 341, 354-358. In the context of deportation, it is unquestionable that state law has a role to play, in that certain convictions for violation of state law are grounds for deportation, and pardons by governors may bar a state conviction from being so used.

"Indeed, in Matter of G-, supra, 9 I. & N. Dec. at 169, the Attorney General recognized that the Supreme Court's per curiam reversal of a deportation order under Section 1251(a)(4) in Pino v. Landon, 349 U.S. 901, indicated that the question whether a conviction should be treated as a basis for deportation is not 'purely a "federal question."

"In addition, as to crimes of moral turpitude not involving narcotics or marihuana, the Service, with the approval of the Attorney General and the courts, has been taking into account the effect of state post-conviction expungement laws in determining that an otherwise final conviction should not be regarded as a basis for deportation. It should be noted that state expungement statutes have been allowed to pretermit deportation even where there is no comparable federal statute applicable to a

similar federal conviction. For example, while the Federal Youth Corrections Act provides relief comparable to that authorized by Section 1722 of the California Welfare and Institutions Code, involved in the instant case, no federal statute authorizes expungement more generally following completion of probation, as does Section 1203.4 of the California Penal Code, pursuant to which expungement has been held repeatedly to bar deportation based on the expunged conviction for a crime of moral turpitude.

"Expungement statutes concerning youth offenders, perhaps even more than other expungement laws, reflect a policy of providing a clean start which would be virtually negated if deportation under federal law were still a consequence of an expunged state marihuana conviction of a youth. A disparity in treatment of state and federal youth offenders is particularly inappropriate in view of the fact that, quite frequently, the underlying facts involve violation of state and federal law, and may be the basis of either state or federal prosecution. Indeed, as to persons under twenty-one, federal law encourages the United States Attorney to forego prosecution and surrender the juvenile to state authorities if 'it will be to the best interest of the United States and of the juvenile offender' to do so. 18 U.S.C. 5001. Where a choice can be made, it is gen-

erally the practice that the less serious offenses are handled by state prosecution, and that federal prosecutions are reserved for the more serious offenses.

"Thus, to confine the result in Morera to youth offender convictions expunged under the federal law would tend to produce the anomalous situation where, for example, a youth offender prosecuted federally and convicted of a serious marihuana offense would not be deportable of the conviction were expunged, while one prosecuted in state court and convicted on a trivial marihuana offense would therefore be deportable, even if the conviction were expunged.

"Such disparity is difficult to justify or defend, and should be avoided if possible by a reasonable construction of the statute. At a minimum, I think that, consistent with Morera, the Service would be warranted in construing Section 1251(a)(11) as not requiring deportation on the basis of a state marihuana conviction of a youth offender which has been expunged or set aside pursuant to a law comparable to the Federal Youth Corrections Act, if the youth offender upon conviction could have obtained expungement under the federal law if he had been subjected to federal prosecution. This construction is consistent not only with Morera, but also with the general statutory scheme.

"The crucial legislative development relied upon by the Attorney General in Matter of A- F-, as indicating a strong congressional policy favoring deportation of aliens involved in narcotics traffic, was the Narcotics Control Act of 1956, 70 Stat.575. That act added language to Section 1251(b) to exclude deportations under Section 1251(a)(11) from its provision that a pardon or recommendation of the sentencing judge against deportation would bar deportation under Section 1251(a)(4), based on conviction of a crime of moral turpitude. Prior to 1960, however, Section 1251(a)(11) applied in terms only to convictions involving narcotics, and did not apply to marihuana offenses. Therefore, the 1956 amendment does not necessarily reflect a clear national policy as to marihuana offenses. While the inclusion of marihuana offenses in Section 1251(a)(11) in 1960 did reflect a judgment that such offenses could be a basis for deportation, the legislative history of that amendment does not suggest a specific congressional intent that expungement of a marihuana conviction (or indeed of any conviction covered by Section 1251(a)(11)) should be completely disregarded for deportation purposes.

"Moreover, the fact that the 1956 amendments excluded narcotics offenses from the provision for pardons, but did not purport to exclude them from the settled policy and practice of not treating expunged convictions as

convictions for deportation purposes, can be said to suggest that no change was intended in that regard. See Morera, supra, 462 F. 2d at 1032.

"Significantly, it was held in Morera that neither the 1956 amendment to Section 1251(b) nor the 1960 inclusion of marihuana offenses in Section 1251(a)(11) interferes with the analogous treatment of marihuana convictions set aside under the Federal Youth Corrections Act (18 U.S.C. 5021), as not being grounds for deportation under Section 1251(a)(11).

"In any event, whatever may have been Congress'policy toward narcotics offenders at the time of the decision in Matter of A- F-, recent legislation indicates a dif- Congressional policy toward persons convicted of a simple possession of marihuana. Thus, in 1970 Congress found that 'there is a lack of an authoritative source for obtaining information involving the health consequences of using marihuana.' 21 U.S.C. 186. Accordingly, Congress established the National Commission on Marihuana and Drug Abuse and directed it to conduct a comprehensive study of the use and effects of marihuana. 84 Stat. 1280-1281, 21 U.S.C. 801, note. In 1970, as an interim measure for the period during which the Commission's report was being prepared and considered, Congress reduced the penalties for initial marihuana offenses--from a mandatory term of at least five and up to twenty years (see 21 U.S.C. (1964 ed.) 176a) to a maximum term of one

year for possession--and provided a new procedure whereby a charge and finding of guilt for a first offense of simple possession could be expunged and not treated as a conviction for any purpose. 21 U.S.C. 844. In its report in 1972 the Commission recommended that possession and personal use of marihuana be decriminalized. See Report of the Commission on Marihuana and Drug Abuse 152-161.

"If it was appropriate to consider a heightening of federal concern about narcotics offenders as requiring their exclusion from the usual consequences of expungement of convictions for deportation purposes, it would seem equally appropriate to consider a lowering of sanctions for such offenses, at least as to possession of marihuana, as removing pro tanto the policy basis for such exclusion. ..." Matter of Andrade, Interim Decision 2276 (BIA-1974).

The appellant contends that a failure to award his expungement the same weight and legal effect as an expungement under "youth correction" statutes is to deprive him of due process under the Fifth Amendment of the United States Constitution.

Aliens, as well as citizens, are entitled to the protection of the Fifth Amendment of the Federal Constitution. United States v. Pink, 315 U. S. 203. "This

Court has never attempted to define with precision the words 'due process of law' ... It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard..." Holden v. Hardy, 169 U.S. 366, 389. "Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment." Bartkus v. Illinois, 359 U. S. 121, 128. Also, "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Bolling v. Sharpe, 347 U. S. 497, 499; Schneider v. Rusk, 377 U.S. 163, 168.

Our society is re-evaluating its view of possession of marijuana. Mr. Bork's observations have been cited to the Court, supra. The Alaska Supreme Court, in Ravin v. State, (May 27, 1975) 17 CrL 2205, in weighing the citizen's right to privacy in contrast with the State's right to police stated:

"Our examination of relevant data on the effect of marijuana use upon the individual and society leads us to conclude that the state has not demonstrated sufficient

justification for the prohibition of possession of marijuana in the home..." Ravin, Id. 17 CrL 2205, 2206. The American Bar Association and numerous State Bar Associations have called for a decriminalization of possession of marijuana. Various state legislatures have enacted such statutes. Presumably an alien in possession of marijuana in a State with such a statute would not be subject to deportation.

The appellant does not dispute the respondant's authority to deport under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)) for possession of marijuana as long as a conviction exists, rather he argues that Due Process requires the expungement of his record be awarded the same legal effect as youthful offenders. The appellant submits that the "creative element" regerred to by B. Cardozo in his The Nature Of The Judicial Process 163-65 (1921) is present here. See also B. Cardozo, The Growth Of The Law (1924) "The law like the traveler must be ready for the morrow. It must have a principle of growth." Id. at 20. Roscoe Pound enunciated a similar idea when he stated that the "law must be stable and yet it cannot stand still". R. Pound Interpretations of Legal History 1 (1923). To deport him for a Connecticut conviction which Connecticut says never occurred and which he can legally deny ever occurred is to deny him Due Process. Given his change in life style since April 29, 1971 and

present society's views toward simple possession, deportation would constitute Cruel and Unusual Punishment as well.

CONCLUSIONS

A resident alien who entered the United States in 1957 and who was convicted of possession of marijuana in the Connecticut Superior Court for New London County may not be deported for said conviction pursuant to Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)) when the Superior Court for New London County has granted his post-conviction motion, i.e., Petition For Erasure of Record, when the legal effect of said Motion, pursuant to Section 54-90 of the Connecticut General Statutes, is to expunge the conviction and the arrest ab initio since the conviction which forms the basis for the action under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(11)) does not exist and, indeed, never existed.

The failure of the Immigration and Naturalization Service to accept the expungement of the appellant's record by the Connecticut Superior Court when the Immigration and Naturalization Service accepts Federal and State expungement of records under "youth corrections" acts of individuals found deportable under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C.

1251(a)(11) is a denial of Due Process under the Fifth Amendment of the United States Constitution.

WHEREFORE, appellant respectfully prays this Court for an Order:

(a) Declaring that the deportation order issued against him is null and void and contrary to law;

(b) Restraining respondent from apprehending, detaining or deporting appellant;

(c) Directing respondent to enter an Order terminating the proceedings against appellant;

(d) For such other and further relief as may be appropriate.

Respectfully submitted,

THE APPELLANT,
REINHARD WILHELM LINDNER,

By J. Ward Rafferty
J. Ward Rafferty
His Attorney